

§ 779.322

certain plumbing and heating equipment, electrical fixtures and supplies, and fencing and siding for residential installation. In addition to selling the goods they may also install, at an additional charge, the goods which are sold. Installation which is incidental to a retail sale (as distinguished from a construction or reconstruction contract to do a building alteration, or repair job at a contract price for materials and labor required, see § 779.355(a)(1) is considered an exempt activity. By way of example, if the installation for the customer of such goods sold to him at retail requires only minor carpentry, plumbing or electrical work (as may be the case where ordinary plumbing fixtures, or household items such as stoves, garbage disposals, attic fans, or window air conditioners are being installed or replaced), or where only labor of the type required for the usual installation of chain link fences around a home or small business establishment is involved, will normally be considered as incidental to the retail sale of the goods involved (unless, of course, the transaction between the parties is for a construction job at an overall price for the job, involving no retail sale of goods as such). In determining whether such an installation is incidental to a retail sale or constitutes a nonretail construction activity, it is necessary to consider the general characteristics of the entire transaction. Where one or more of the following conditions are present, the installation will normally be considered a construction activity rather than incidental to a retail sale:

(1) The cost to the purchaser of the installation in relation to the sale price of the goods is substantial;

(2) The installation involves substantial structural changes, extensive labor, planning or the use of specialized equipment;

(3) The goods are being installed in conjunction with the construction of a new home or other structure; or

(4) The goods installed are of a specialized type which the general consuming public does not ordinarily have occasion to use.

(e) An auxiliary employee of an exempt retail or service establishment performing clerical, maintenance, or

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custodial work in the exempt establishment which is related to the establishment's construction activities will, for enforcement purposes, be considered exempt in any workweek if no more than 20 percent of his time is spent in such work.

“RECOGNIZED” AS RETAIL “IN THE PARTICULAR INDUSTRY”

§ 779.322 Second requirement for qualifying as a “retail or service establishment.”

If the business is one to which the retail concept is applicable then the second requirement for qualifying as a “retail or service establishment” within that term's statutory definition is that 75 percent of the establishment's annual dollar volume must be derived from sales of goods or services (or of both) which are recognized as retail sales or services in the particular industry. Under the Act, this requirement is distinct from the requirement that 75 percent of annual dollar volume be from sales of goods or services “not for resale” (§ 779.329); many sales which are not for resale lack a retail concept and the fact that a sale is not for resale cannot establish that it is recognized as retail in a particular industry. (See *Wirtz v. Steepleton General Tire Co.*, 383 U.S. 190.) To determine whether the sales or services of an establishment are recognized as retail sales or services in the particular industry, we must inquire into what is meant by the terms “recognized” and “in the particular industry,” and into the functions of the Secretary and the courts in determining whether the sales are recognized as retail in the industry.

§ 779.323 Particular industry.

In order to determine whether a sale or service is recognized as a retail sale or service in the “particular industry” it is necessary to identify the “particular” industry to which the sale or service belongs. Some situations are clear and present no difficulty. The sale of clothes, for example, belongs to the clothing industry and the sale of ice belongs to the ice industry. In other situations, a sale or service is not so easily earmarked and a wide area of